INVESTIGATION REPORT

ENFORCEMENT OF BUILDING MANAGEMENT ORDINANCE

June 2004

Office of The Ombudsman

Hong Kong

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Executive Summary of Investigation Report on Enforcement of the Building Management Ordinance

The Investigation

In view of considerable community concern, The Ombudsman decided to conduct a direct investigation into the adequacy and effectiveness of the enforcement of the Building Management Ordinance ("BMO") by the Home Affairs Bureau ("HAB") and the Home Affairs Department ("HAD"). This is our third direct investigation into Government's support and services for private building management.

2. This direct investigation :

- examines the mechanism through which HAB and HAD enforces the provisions of the BMO;
- takes stock of the efforts made in enforcement;
- evaluates the adequacy and effectiveness of such mechanism and efforts; and
- assesses the need for improvement.

Government Policy

3. It is Government's policy to facilitate owners' management and maintenance of private buildings. To this end, Government provides a legal framework through the BMO. Government also provides, mainly through HAD, advisory support and training programmes. HAD also deals with building management complaints and helps resolve building management disputes.

Building Management Ordinance, Cap.344

4. The BMO provides for the incorporation of owners and the management and maintenance of their buildings. It sets out the duties, rights and powers of Owners' Corporations ("OCs"), Management Committees ("MCs"), owners and the Authority. The Secretary for Home Affairs ("SHA") is the Authority for the Ordinance and HAD, his executive arm.

5. The Ordinance defines the duties and powers of OCs and MCs with regard to the management and maintenance of common parts of a building, preparation of budgets and accounts, keeping of financial and meeting records, etc. It also confers on owners the rights to monitor the operations of their OC/MC, which include the rights to inspect and/or obtain a copy of OC budgets and accounts and to require the MC chairman to convene an OC general meeting for specified purposes at the request of not less than 5% of the owners.

6. SHA as the Authority is empowered under section 40A to inspect common parts of a building, attend OC general meetings and inspect and/or obtain a copy of OC budgets, accounts, documents and records. He may order the MC of a building to appoint a building management agent to manage the building, institute prosecution for offences under the BMO and apply to the Lands Tribunal for an order to dissolve an MC and appoint an administrator.

Enforcement Mechanism

7. HAD staff visit private buildings at least once a year, for an understanding of the general condition of the building and the functioning of the OC/MC. HAD considers that owners should monitor the operations of their OC/MC and the Department should not intervene in its daily operations. However, if HAD staff should spot possible contravention of the BMO, they would remind the OC/MC concerned of the requirements of the Ordinance and the importance of compliance.

8. A similar approach is adopted when handling building management enquiries and complaints. HAD staff are under instruction to advise or informally mediate in disputes, but not to arbitrate or take a policing role.

9. According to the prosecution guidelines, HAD staff are to investigate to see if there is adequate evidence to substantiate an alleged breach of the BMO. They are to consider **the nature of the offence, the intention of the offender(s)** and **public interest**, before making a recommendation to SHA for prosecution or not.

10. In deciding whether SHA's powers of inspection under section 40A should be invoked, HAD would consider if there is *prima facie* evidence of breach of the BMO or of serious management problems in the building. Documents and information obtained under section 40A are for SHA's use only, and not to be divulged to owners.

Resolution of Disputes

11. Besides conducting informal mediation by its own staff, HAD has been providing since mid-2002 a free mediation service under a pilot scheme with the assistance of two professional mediation bodies. HAD refers cases to a Joint Assessment Panel with representatives from both mediation bodies. In the past two years, 13 cases have been assessed. Only five were actually mediated, two of which were successfully resolved.

12. If HAD's advice is not taken or mediation fails, HAD would advise the affected party to consider taking one or both courses of action prescribed in the BMO :

- to require the MC chairman to convene an OC general meeting for specified purposes at the request of not less than 5% of the owners
- to bring the case to the Lands Tribunal for adjudication

Enforcement Records

13. Since the enactment of the BMO, SHA has :

- never instituted prosecution against anyone;
- never invoked his powers; and
- never applied to the Lands Tribunal for a court order.

Moreover, no survey has ever been conducted to ascertain the degree of compliance with the BMO.

Case Studies

14. We have examined all six requests for prosecution received by

HAB/HAD between August 2000 and July 2003. All of them related to alleged breach of section 27(1) – failure of MCs to prepare and table the OC accounts at general meetings of the OCs. All such requests were turned down. In the most blatant case :

- The requestor had made ten written requests to the MC for inspecting the OC accounts.
- HAB/HAD had issued six written and numerous verbal reminders urging the MC to comply with section 27(1).
- More than 5% of owners had requested a general meeting of the OC for dissolving the MC.
- Numerous owners had complained bitterly to HAD, HAB and the Chief Executive's Office for HAB's/HAD's failure to prosecute the MC.

All such efforts were in vain. The MC eventually only tabled the OC accounts for one 12-month period in 36 months. HAB/HAD's inaction is disappointing.

15. We have also examined all eight requests for invoking SHA's powers received by HAB/HAD in the same period. All of them were turned down for the same reason : the state of the building did not warrant the invocation of SHA's powers.

16. We find that all requests for enforcement were screened by relatively junior HAB/HAD staff without proper delegation of authority from SHA. None has been submitted to SHA for his decision, contrary to the requirements in the guidelines. There was also no regular reporting to SHA on the handling of the requests. Furthermore, we note serious delays in processing and replying to some of the requests.

Observations and Opinions

Inspections

17. Since HAB/HAD has an enforcement/execution role under the BMO, we consider that HAD staff should be expected to look out for non-compliance during site visits and meetings. Many owners are not

familiar with the BMO and may not be sufficiently aware to notice and report non-compliance. HAD's existing booklet provides general guidance on various aspects of OC/MC operations but fails to offer ready reference on the key requirements of the BMO.

Prosecutions

18. HAB/HAD has made no attempt to prosecute even in blatant cases. HAD adopts an attitude of indefinite, or even infinite, latitude towards offenders. It interprets the three factors in paragraph 9 in such a way as to justify its reluctance to recommend prosecution. Consistent non-enforcement can only breed disregard for enforcement and disrespect for the law. Allowing blatant breach of the BMO to go unchecked is not in accord with either the basic principle of legislation or Government's declared policy. This is certainly not in the public interest.

19. HAD's prosecution guidelines are inadequate in that they have not spelt out clearly when SHA's powers of inspection under the BMO should be invoked for investigating an alleged breach. They have also not made specific reference to the role of the Department of Justice ("D of J").

Invocation of SHA's Powers

20. We find that HAD's guidelines on invoking section 40A have left out the considerations and constraints outlined in paragraph 10. It is also not clear how HAD determines the degree or extent of management problems which would warrant the exercise of SHA's powers under that section. Furthermore, there are no guidelines for invoking SHA's powers under other sections of the BMO.

Complaints and Disputes

21. HAD's recent efforts to promote corporate governance of OCs and to reinforce the training to MC members have helped to reduce building management complaints and disputes. HAD should keep up these good efforts.

22. Theoretically, the two courses of action mentioned in paragraph 12 could go a long way towards resolving disputes. In practice, there are inherent drawbacks and limitations in these statutory avenues, as shown in paragraphs 25 and 27 below.

Mediation

23. Compared with statutory avenues, there are obvious advantages in mediation. It can resolve a dispute more speedily, at lower cost and without damage to the relationship of the parties involved. The process is confidential, with simple and flexible rules and procedures. However, mediation also has limitations. Participation is entirely voluntary. Parties with a history of adversarial relations or prior litigation are unlikely to agree to mediate.

24. HAD's pilot mediation scheme has not been thoroughly tested. The limit of 3½ hours set for mediating each case is barely adequate for simple and straightforward cases. HAD does not have a comprehensive plan for administering the scheme, nor dedicated pamphlets to publicise it.

Convening an OC general meeting

25. It may be difficult to obtain the consent of 5% of owners required to convene an OC general meeting. Forming a quorum for the meeting is even more difficult. MC chairmen may refuse to convene such meetings, and there is no penalty for so refusing. Reluctant MC chairmen may also employ various tactics to delay or frustrate legitimate requests for such meetings.

26. Such malpractices are not uncommon. Unfortunately, HAD is unable to help the owners or provide relevant statistics to us. To protect owners' interests, SHA should be empowered to order an MC to convene an OC general meeting if owners' legitimate request for such a meeting is unreasonably refused or frustrated.

Adjudication by Lands Tribunal

27. Adjudication by the Lands Tribunal can be costly and time-consuming as legal formalities apply. The range of solutions is limited. Neighbourly relationship is prone to damage under a "win-lose" situation. Worse, the losing party may appeal to a higher court, adding even greater burden on cost, time and energy.

28. For these reasons, owners are often reluctant to bring their case to the Lands Tribunal. There are calls for simplifying the mechanism for adjudicating building management disputes. Two suggestions have been considered by HAD for some time, viz. a Building Management Tribunal and a Wise Men Panel.

Conclusions

29. On the basis of our investigation, we have the following conclusions :

(a) HAB/HAD has failed to enforce the BMO.

(b) HAB's/HAD's guidelines and procedures for enforcing the BMO are either inadequate or non-existent.

(c) HAD has been "deciding" on requests for enforcement without proper delegation of authority or reporting to SHA.

(d) SHA, as the Authority for the BMO, has not shown sufficient interest in the enforcement of the Ordinance or monitored HAD's execution on his behalf.

(e) HAB/HAD has no statistics or firm data to help formulate an efficient and effective strategy for handling building management disputes.

(f) The use of mediation as a means of settling building management disputes has not been fully tested.

(g) There are deficiencies in the BMO which have been exploited by a small number of persons. HAD is not sufficiently empowered to protect the interests of individual owners in the face of such exploitations.

(h) The present mechanism for adjudicating building management disputes is not sufficiently user-friendly.

Recommendations

30. The Ombudsman makes the following recommendations to HAB and HAD :

Enforcement

(a) To look out proactively for non-compliance and draw up clearer guidelines and procedures for checks and follow-up action.

(b) To promote among OCs/MCs and owners better understanding of the BMO by producing a separate guide or revise the existing one.

(c) To review and revise HAB's/HAD's interpretation of the factors affecting recommendation for prosecution and to take prosecution actions against blatant offenders accordingly.

(d) To make reference in the guidelines to SHA's powers of inspection under the BMO and D of J's role in prosecution.

(e) To spell out clearly in the guidelines the important considerations and constraints for invoking section 40A.

Systems and Procedures

(f) To make proper delegation of authority for processing requests for enforcement and to devise systems for regular reporting to SHA.

(g) To introduce administrative measures, including pledges for issue of replies, into the guidelines to ensure proper and timely handling of requests for enforcement.

(h) To draw up specific instructions on the handling of complaints of non-compliance and take steps to ensure timely processing of such complaints and proper keeping and analysis of relevant statistics and data.

Mediation

(i) To extend the pilot mediation scheme and to improve its operations so as to properly try out public acceptance and effectiveness of mediation in resolving building management disputes.

Statutory Avenues

(j) To amend the BMO to enable the Authority to order an MC to convene a general meeting of the OC for specified purposes.

(k) To expedite discussion and consultation with parties concerned and develop an early proposal for a simple and effective mechanism for adjudicating building management disputes.

Final Remarks

31. HAB/HAD undertakes to consider our recommendations carefully and work out how best to implement them. The Ombudsman is pleased to learn that HAB/HAD has generally accepted our recommendations.

Epilogue

32. This rounds off our three direct investigations on Government's services and actions in building management :

- Role of HAD in facilitating formation of OCs (published

in March 2003)

- Assistance by HAD to owners and OCs in managing and maintaining their buildings (published in November 2003)
- Enforcement of the BMO (published in June 2004)

- End -

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LEGEND OF ABBREVIATIONS

BMO	Building Management Ordinance, Cap.344
BMRC	Building Management Resource Centre
D of J	Department of Justice
DC	District Council
DHA	Director of Home Affairs
DMC	Deed of Mutual Covenant
DO	District Office
HAB	Home Affairs Bureau
HAD	Home Affairs Department
HPLB	Housing, Planning and Lands Bureau
HQ	Headquarters
LegCo	Legislative Council
MC	Management Committee
OC	Owners' Corporation
SHA	Secretary for Home Affairs

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1

INTRODUCTION

BACKGROUND

1.1 In March and November 2003, this Office announced the findings of two direct investigations into the services provided by the Home Affairs Department ("HAD") in facilitating the formation of Owners' Corporations ("OCs") and in assisting owners and OCs in the management and maintenance of their buildings. In the course of those two investigations, we noted considerable community concern over the adequacy and effectiveness of the enforcement of the provisions of the Building Management Ordinance ("BMO") by HAD and the Home Affairs Bureau ("HAB"), in particular those relating to the proper operations of OCs. In view of such concern, The Ombudsman decided to conduct a further direct investigation under section 7 (1)(a)(ii) of The Ombudsman Ordinance, Cap. 397. The Secretary for Home Affairs ("SHA") and the Director of Home Affairs ("DHA") were notified in early December 2003. A press announcement was made in mid-December 2003.

AMBIT

1.2 The ambit of this direct investigation is :

(a) to examine the mechanism through which Government enforces the provisions of the BMO;

(b) to take stock of Government's efforts in enforcing the provisions of the Ordinance;

(c) to evaluate the adequacy and effectiveness of such mechanism and efforts; and

(d) to assess the need for improvement.

METHODOLOGY

1.3 For this investigation, we have :

(a) studied relevant papers, documents, notes of meetings, statistics and case files of HAD;

(b) interviewed a number of frontline staff working in HAD District Offices ("DOs");

(c) held discussions with officers of the Building Management Division (Division IV) of HAD Headquarters ("HQ");

(e) held discussions with the Mediation Co-ordinator's Office of the Judiciary and professional bodies on mediation;

(f) studied the views expressed by Legislative Council ("LegCo") Members and District Council ("DC") Members at relevant meetings and by professional bodies and OC associations at focus group meetings convened by HAD;

(g) studied public complaints received by the LegCo Secretariat and this Office; and

(h) invited views from the general public.

1.4 A list of HAD offices/units and other organisations with which we have held discussions is at **Annex 1**. HAB was not further approached as the Bureau had transferred its policy responsibility for building management, including that concerning the BMO, to HAD since April 2003. However, we have

kept HAB posted on progress.

REPORT

1.5 The draft investigation report was sent to SHA and DHA for comments on 11 June 2004. This final report, incorporating the comments of HAD/HAB, was issued on 26 June 2004.

2

OVERVIEW

2.1 This chapter outlines the main features of the BMO and a Deed of Mutual Covenant ("DMC"), and sets out HAD's proposed amendments to the law and recent developments on the subject of building management.

POLICY OBJECTIVES

2.2 It is Government's objective to facilitate owners' management and maintenance of private buildings. To this end, Government provides a legal framework through the BMO. To assist owners in practical operations, Government provides, mainly through HAD, advisory support and training programmes. HAD also deals with building management complaints and helps resolve building management disputes.

BUILDING MANAGEMENT ORDINANCE, CAP. 344

2.3 In 1970, the Multi-storey Buildings (Owners Incorporation) Ordinance was enacted to enable owners of

private property to be incorporated and to provide for the management and maintenance of their buildings. The Ordinance was extensively amended in 1993 to keep pace with changing circumstances and was renamed as the BMO. The Ordinance was again amended in 1998 and 2000 to facilitate the formation and operations of OCs.

2.4 The Ordinance sets out the duties, rights and powers of OCs, Management Committees ("MCs"), owners, the Authority and other parties concerned. SHA is the Authority for the Ordinance and, to all intents and purposes, HAD is his executive arm.

Duties, Powers and Operations of OCs/MCs

2.5 The Ordinance imposes certain duties and confers certain powers on OCs and their MCs. These include :

- duties and powers of an OC/MC (sections 14, 16, 18 and 29)
- powers of entry into and inspection of a private flat (section 40)
- termination of a building manager's appointment (paragraph 7(1) of the Seventh Schedule)

2.6 The Ordinance also imposes certain legal

requirements on the operations of OCs/MCs. These include :

- composition and procedures of an MC (section 6 and the Second Schedule)
- meetings and procedures of an OC (section 8(5) and the Third Schedule)
- establishment and maintenance of funds (section 20)
- procurement of supplies, goods and services (section 20A)
- contributions to funds (sections 21 and 22)
- preparation of budgets (section 21(4) and the Fifth Schedule)
- preparation of accounts and keeping of financial records (section 27 and the Sixth Schedule)

Rights of Owners

2.7 To protect the interests of property owners and to provide checks and balance on the powers of OCs/MCs, the Ordinance confers certain rights on property owners to monitor the operations of OCs/MCs. These include the rights below :

- to inspect the books of account of an OC (section 27(2));
- to inspect and obtain a copy of the insurance

policy of a building (sections 28(1) and 28(2));

- to obtain a copy of the budget of an OC (paragraph 4 of the Fifth Schedule); and
- to obtain a copy of the income and expenditure account and balance sheet of an OC (paragraph 3 of the Sixth Schedule).

2.8 At the request of not less than 5% of the owners, the MC chairman is required to convene a general meeting of the OC for the purposes specified by such owners within 14 days of receiving such request (paragraph 1(2) of the Third Schedule).

Powers of the Authority

2.9 The Ordinance confers certain powers on SHA as the Authority, including :

- to inspect the books of account of an OC (section 27(2))
- to inspect and obtain a copy of the insurance policy of a building (sections 28(1) and 28(3))
- to obtain a copy of the budget of an OC (paragraph 5 of the Fifth Schedule)

- to obtain a copy of the income and expenditure account and balance sheet of an OC (paragraph 4 of the Sixth Schedule)
- to enter and inspect common parts of a building, to attend any general meeting of an OC, to require an OC or any person managing the building to provide information, to inspect the books or records of account and any other records kept by an OC, for the purpose of ascertaining the manner in which a building is being controlled, managed or administered (section 40A)
- to order an MC to appoint a building management agent for the purposes of managing the building (section 40B)

2.10 Under the Ordinance, SHA may institute prosecution for certain offences. There are nine offences under the BMO with penalty clauses. A list of the offences and penalties is at **Annex 2**.

2.11 Under section 44 of the BMO, SHA may issue Codes of Practice giving guidance and direction to OCs/MCs. SHA has so far promulgated two Codes of Practice on :

- the procurement of supplies, goods and services

(section 44(1)(a))

- the standards and practices of building management and maintenance (section 44(1)(b))

2.12 Under section 44(2) of the BMO, failure on the part of any person to observe the Codes shall not of itself render that person liable to criminal proceedings of any kind. However, any such failure may, in any proceedings whether civil or criminal including proceedings for an offence under the BMO, be relied upon as tending to establish or to negate any liability which is in question in those proceedings.

Jurisdiction of the Lands Tribunal

2.13 Under section 45 of the BMO, the Lands Tribunal has jurisdiction over a wide range of matters relating to building management, a list of which is in the Tenth Schedule to the BMO. Individual owners, MCs, OCs or SHA may take their cases to the Tribunal for adjudication. One may also apply to the High Court direct for hearing. In exercising its jurisdiction, the Tribunal has the same powers to grant legal and equitable remedies and reliefs as the High Court.

2.14 Under section 31(1) of the BMO, the Tribunal may, upon application by an owner or SHA, dissolve the MC and appoint

an administrator. Under section 40C, the Tribunal may, upon application by SHA, order that a meeting of owners be convened for the purpose of appointing an MC or a building management agent to manage the building.

DEED OF MUTUAL COVENANT

2.15 A DMC is a private contract executed between the developer and property owners. It sets out the responsibilities and duties of the developer, the manager and the owners of the building. It also provides for the management of the common parts of a building. Invariably, a DMC is prepared by a solicitor appointed by the developer and entered into between the developer and the first purchaser. Assignment of flats to subsequent purchasers is subject to the benefit and burden of the DMC.

2.16 In order to protect owners from the imposition of unfair terms in the DMC in favour of the developer and the manager, the BMO has provided for mandatory terms which are impliedly incorporated into every DMC (section 34E and the Seventh Schedule) and optional terms which are impliedly incorporated if consistent with the DMC (section 34F and the Eighth Schedule). Sections 21, 27, 34C to 34L and the Second, Third, Fifth and Sixth Schedules to the BMO shall prevail in

the event of any inconsistency between the BMO and the terms of a DMC or any other agreement. The two legal documents (i.e. the BMO and the DMC) need to be read together in order to determine the legal responsibilities of each party.

RECENT DEVELOPMENTS

Proposed Further Amendments

2.17 For better management of private buildings, HAD proposed further amendments to the BMO in May 2003 for public consultation. The proposals aim at facilitating OCs' performance of duties and exercise of powers, rationalising the procedures for appointment of an MC and its members, and affording better protection for the interests of building owners. Proposals relevant to this investigation include :

- to empower an OC to borrow from Government, on behalf of those individual owners who fail or refuse to pay, for the purpose of complying with statutory orders or notices related to the common parts of a building
- to require an OC to accept or reject any tender of a value exceeding a certain amount by a resolution passed at a general meeting of

the OC

- to provide for the owners' rights to obtain copies of minutes of OC/MC meetings upon payment of reasonable copying charges

Public consultation on the proposed amendments ended in July 2003.

2.18 Arising from the public consultation and discussions in LegCo, HAD intends to propose some other amendments to the BMO. These are mainly on procedures for appointment of an MC, appointment of proxy and setting up of accounts for OCs. HAD is preparing an amendment bill for introduction to LegCo in the 2004/05 legislative session.

Consultation on Building Management and Maintenance

2.19 The outbreak of the Severe Acute Respiratory Syndrome has brought into sharp focus the importance of proper upkeep of buildings. For a long-term solution to prevent building neglect and decay, the Housing, Planning and Lands Bureau ("HPLB") issued a consultation paper on building management and maintenance in December 2003. In the consultation paper, HPLB advocated that :

- owners must accept responsibility for keeping

their buildings in good repair, including the necessary financial commitment

- building management and maintenance should be integrated to provide a sustainable solution to the problem of building neglect
- the relevant industries should come up with user-friendly and cost-effective management and maintenance services to assist owners in discharging their responsibilities
- Government, in addition to enforcing the law and promoting owners' awareness, should support and facilitate the above efforts working with and making good use of the expertise and resources of relevant non-government bodies

2.20 HPLB proposed some support measures to complement the promotion of building management and maintenance. These included introducing some form of mandatory management for buildings in multiple ownership, facilitating the recovery of contributions to management and maintenance from property owners, promoting high standards of management and maintenance through a voluntary building classification scheme and providing financial assistance for owners in genuine need. The consultation exercise ended in April 2004. HPLB is analysing the views collected.

3

ENFORCEMENT MECHANISM AND EFFORTS

3.1 This chapter describes the mechanism for enforcing the provisions of the BMO and takes stock of Government's enforcement efforts.

INSPECTIONS

3.2 DO staff of HAD visit private buildings in their respective districts at least once a year to understand the general condition of the buildings and the functioning of the OCs (or other building management bodies). Reports of visits, sample at **Annex 3**, are submitted by the staff to the Liaison Officers in charge for information and follow-up action where necessary.

3.3 HAD reiterates Government's long-standing policy that the responsibility to manage and maintain buildings rests squarely with the property owners. They have acquired and own their building and should take care of it. They should also

be most familiar with the condition there. It is in their own interest to monitor the operations of their OC/MC within the framework of the BMO and the DMC. It is not appropriate, or possible, for HAD to intervene in the daily operations of an OC/MC or the day-to-day management of a building.

3.4 HAD considers that non-compliance with the BMO may be ascertained only through detailed investigation and close examination, not one or two site visits. The resources required for so doing would be immeasurably high. Furthermore, matters relating to building management are set out in the DMCs of individual buildings. HAD staff are neither empowered nor qualified to interpret DMCs, which vary significantly among different buildings. OCs or owners, if in doubt, should engage their own legal professionals to interpret the DMC or approach HAD's Building Management Resource Centres ("BMRCs") to arrange for free legal advice.

3.5 However, if HAD staff spot possible contravention of the BMO during their visits to buildings or meetings with OCs/MCs, they would remind the OC/MC concerned verbally or in writing of the legal requirements of the BMO and the importance of compliance.

HANDLING OF REQUESTS AND COMPLAINTS

Requests for Prosecution

3.6 HAB and HAD have jointly drawn up guidelines for handling requests for prosecution under the BMO. A copy is at **Annex 4.** The guidelines are annexed to the Operational Manual on Building Management for Liaison Officers.

3.7 For non-compliance with the nine provisions which carry penalty clauses (Annex 2), SHA as the Authority for the BMO has the powers to investigate such cases and institute prosecution where warranted. When HAB/HAD notes a suspected breach of any of those provisions or receives a request for instituting prosecution, HAD staff are to investigate and gather relevant facts to see if there is adequate evidence to substantiate the allegation. They should also consider the following factors before making their recommendation to SHA :

(a) nature of the offence - whether it is trivial or significant; whether any persons have suffered or have been victimised as a result;

(b) intention of the offender(s) - whether the offence is committed by intention or through oversight; and

(c) public interest – whether it is in the public interest to prosecute; whether prosecution would deter people from taking part in building management.

3.8 HAD staff are to report to HAB via HAD HQ giving the case background, relevant facts and a recommendation to prosecute or not. Having examined the report, the subject officer in HAB should put the case to SHA for his personal decision and convey the decision to the requestor in writing. The Department of Justice ("D of J") would be consulted in the process and make the final decision as to whether prosecution should proceed.

3.9 Records show that :

- no one has ever been prosecuted for any of the offences under the BMO
- no case has ever been put to D of J for a decision to prosecute
- no case has ever been put to SHA for consideration

Requests for Invoking SHA's Powers

3.10 HAB and HAD have jointly drawn up guidelines for

handling requests for invoking section 40A, which gives SHA the discretion to ascertain the manner in which a building is being controlled, managed or administered (paragraph 2.9). A copy of the guidelines is at **Annex 5**. The guidelines are annexed to the Operational Manual on Building Management for Liaison Officers.

3.11 According to the guidelines, owners and occupants are to be encouraged to manage their buildings under a self-help concept. HAD should intervene in the management of individual buildings only when there is a very strong need, e.g. when the owners cannot find a better alternative within the legal framework. HAD's role is not one of "supervisor-in-general" for the day-to-day management of private buildings.

3.12 HAD explains that section 40A provides for residual powers to be exercised by SHA. According to the legislative intent of that section, such residual powers should be exercised only in the last resort when all other possible courses of action within the legal framework have been exhausted and proven futile. Given the private nature of building management disputes, HAD maintains that it would not be in the public interest for the Department to get involved whenever called upon to do so.

3.13 HAD points out that individual owners may exercise

their rights under the BMO to monitor the operations of their OC/MC by :

- requesting to inspect and/or obtain a copy of the documents mentioned in paragraph 2.7
- requesting the necessary information from the OC/MC through civil proceedings
- requiring the MC chairman to convene a general meeting of the OC to discuss specified issues upon the request of not less than 5% of the owners (paragraph 1(2) of the Third Schedule)
- taking the disputes with their OC/MC to the Lands Tribunal for adjudication (section 45 and the Tenth Schedule)

3.14 HAD advises that any information or documents obtained under section 40A are to be used by SHA solely for the purpose of ascertaining the manner in which a building is being controlled, managed or administered, and not to be divulged to owners of the building concerned. In this light, the Department does not entertain requests from owners to obtain on their behalf information or documents prepared or possessed by their OC/MC.

3.15 HAD explains that, in deciding whether section 40A should be invoked, SHA would consider if there is *prima facie*

evidence that any provision of the BMO has been breached or that there are serious management problems in the building. On the latter point, HAD has considered setting out a scientific formula on the state of management of a building which would warrant Government intervention. However, the Department found it unrealistic to do so as the state of management of individual buildings varies considerably.

3.16 As regards sections 40B and 40C (paragraphs 2.9 and 2.14), HAD points out that the criteria for invoking them are set out clearly in the BMO. The Department considers that there are shortcomings in the two sections, as neither Government nor the Court is empowered to appoint a building management agent directly for a problematic building. The HPLB public consultation document in late December 2003 recommended that Government look into the role of the OC in the management of a building and examined the circumstances that would call for mandatory building management (paragraph 2.20).

3.17 Neither HAB nor HAD has drawn up any guidelines for invoking SHA's powers other than those under section 40A. HAD argues that the core principle of exercising such powers is the same, i.e. to analyse all available information before making a decision.

3.18 According to HAD, SHA's powers under sections 27(2),

28(3), 40A, 40B, paragraph 5 of the Fifth Schedule and paragraph 4 of the Sixth Schedule have never been invoked. Moreover, SHA has never made any applications to the Lands Tribunal under section 31(1) or 40C of the BMO.

Complaints of Non-Compliance

3.19 Departmental instructions on the handling of building management enquiries and complaints are in Chapter 11 of the Operational Manual on Building Management for Liaison Staff. A copy is at **Annex 6**.

3.20 According to the instructions, building management complaints are categorised as follows:

- general enquiries for information or clarification
- specific complaints about malpractice or against wrong-doers
- disputes arising from conflict of interests among owners
- complaints against HAD staff

3.21 HAD staff are required to assist disputing parties to resolve their problems, adopting a neutral and impartial stance. They are to play an advisory and mediating role in

line with HAD's defined policy and must not arbitrate or take a policing role. If they offer advice, they have to make it clear that it represents only a third party's opinion and is by no means legal advice.

3.22 We have asked HAD for any specific guidelines and procedures for handling allegations of non-compliance with the BMO. HAD replied that its staff would investigate into the matter in a thorough and impartial manner and, if the situation warrants, follow up by reminding the owners or OC/MC concerned verbally or in writing of the legal requirements of the BMO and the importance of compliance.

3.23 In HAD's opinion, allegations of breach of the BMO are often the result of misunderstanding between owners and their OC/MC or their lack of understanding of the provisions of the BMO. Most of these complaints could be resolved through HAD's offer of advice or informal mediation.

3.24 HAD, however, cautions that the wording of many provisions of the BMO is open to interpretation and has, therefore, generated dispute. Furthermore, the law cannot provide solutions to all scenarios or set out detailed rules and procedures for different types of meetings or resolutions. When allegations that certain provisions have not been met come to hand, HAD staff would try their best to advise on the

legal requirements, explain court judgments and rulings (if any) and offer their experience with other buildings. However, it is sometimes difficult for HAD to judge whether an act is actually in compliance with the law or not.

3.25 HAD is unable to provide statistics on reports/complaints of non-compliance received or reminders (verbal or written) issued to OCs/MCs. The Department explains that its staff liaise with OCs/MCs on a daily basis and there are simply too many aspects of interface for such statistics to be collected.

RESOLUTION OF DISPUTES

3.26 There are various informal (non-statutory) and formal (statutory) avenues for resolving building management disputes arising from alleged non-compliance with the BMO.

Non-statutory Avenues

Informal Mediation

3.27 HAD staff perform a mediatory role by persuading the parties in dispute to stay cool, to sit together for discussion and to resolve matters rationally and reasonably.

The staff are required to remain neutral and impartial and refrain from arbitrating or policing over the disputes. HAD is unable to provide statistics on building management disputes mediated by staff, or the success rate of their mediation.

3.28 HAD staff are not accredited mediators and their mediatory efforts are, therefore, informal. Nevertheless, to expand their spectrum of skills, mediation has since 2003 become one of the topics for training HAD staff. HAD has engaged a tertiary educational institution to organise such training.

Formal Mediation

3.29 Since July 2002, HAD has secured the assistance of the Hong Kong Mediation Council and Hong Kong Mediation Centre in running mediation workshops and conducting free mediation sessions for members of the public at the BMRCs under a pilot scheme. The intention is to try out ten cases in order to assess the effectiveness of mediation in resolving building management disputes. The pilot scheme was scheduled to end in April 2004 but has been extended to mid-2004.

3.30 To publicise the pilot scheme, posters have been displayed at BMRCs and DOs. Publicity pamphlets of the two participating mediation bodies are available there. Seven introductory workshops have been organised at the BMRCs for

425 owners and MC members. In addition, HAD staff have been asked to introduce the scheme to OCs and owners in their districts in the course of their regular liaison work.

3.31 For the selection of cases for mediation under the scheme, HAD refers cases to a Joint Assessment Panel of representatives from both mediation bodies. Selection by the Panel is based on the possibility of success of resolution through mediation and the degree of complexity of the case. The maximum time assigned for each case is 3½ hours. More complicated cases that need more time would be screened out and dealt with by paid mediators.

3.32 As of May 2004, HAD had referred 13 cases to the Panel for assessment. Ten had been selected, in five of which the disputing parties refused to go through mediation despite repeated persuasion. In the end, only five cases managed to proceed. Two were successfully resolved : they were about water seepage and distribution of repair and maintenance costs in accordance with the DMC.

Statutory Avenues

3.33 If the parties in dispute are unwilling to go through mediation or if it fails, HAD would advise them to pursue one of the two courses of action prescribed in the BMO :

- to require the MC chairman to convene a general meeting of the OC to discuss specified issues at the request of not less than 5% of the owners (paragraph 1(2) of the Third Schedule)
- to apply to the Lands Tribunal for adjudication (section 45 and the Tenth Schedule)

To Convene a General Meeting of the OC

3.34 Under the **first** course of action, the MC chairman shall convene a general meeting of the OC within 14 days of receiving the owners' request. The owners present may then discuss and decide on the disputes by a majority vote. They may also resolve :

- to remove from office, and replace, any MC member (section 14(2))
- to dissolve the MC and appoint an administrator (section 30)

3.35 HAD reveals that over the years, there has been abuse of this mechanism. Some owners ask for general meetings of the OC to discuss the same subject over and over again, thus disrupting the normal operations of the OC.

3.36 On the other hand, there have been cases where the MC chairman refused to convene a general meeting of the OC despite a request from not less than 5% of the owners. There is, however, no penalty for not complying with this provision. In such cases, HAD only advised the owners concerned to bring their cases to the Lands Tribunal for adjudication. HAD is unable to provide statistics on cases of this nature.

Adjudication by Lands Tribunal

3.37 Under the **second** course of action, an applicant who wishes to bring a dispute before the Lands Tribunal shall file with the Tribunal and serve on the respondent a notice of application. The respondent shall, if he/she wishes to oppose the application, file with the Tribunal and serve on the applicant a notice of opposition with reasons. The applicant and the respondent can choose either to act in person or engage a lawyer. Individual owners who pass a means test may apply for legal aid but OCs are not eligible.

3.38 The prescribed forms for proceedings of the Lands Tribunal are available at the BMRCs. A booklet on "Lands Tribunal - Guide to Court Services" published by the Judiciary is also available there for reference. BMRC staff will advise on the use of the forms in general. Where legal advice is required, BMRC staff will arrange for volunteer lawyers.

However, the services of BMRC staff and volunteer lawyers do not include the completion of the requisite forms and preparation for the proceedings.

3.39 If any party feels that the Tribunal has erred on any point of law in arriving at its decision, he/she may appeal to the Court of Appeal within the prescribed time limit.

3.40 The number of building management cases filed with the Lands Tribunal and the average waiting time during the period from 1999 to 2003 are shown below :

Table 1

Year	Building Management Cases Filed	Waiting Time in days*
1999	397	33
2000	483	26
2001	574	19
2002	332	36
2003	388	24

* Before 2002, the waiting time was measured from setting down to the call-over hearing. Starting from 2002, the waiting time is measured from setting down to trial.

Source : Annual Reports of the Judiciary

MONITORING OF COMPLIANCE

3.41 HAD has not conducted any survey on the degree of public compliance with the BMO.

4

COMMUNITY CONCERNS

4.1 As the subject under investigation is of community concern and public interest, we have studied the views expressed in LegCo and at DC meetings, and by professional bodies and OC associations.

LEGISLATIVE COUNCIL

4.2 Members of the LegCo Panel on Home Affairs discussed this subject at its meetings in May and November 2003. Their views are summarised below :

(a) HAD should monitor the operations of OCs/MCs to ensure compliance with the BMO. Once non-compliance is detected, the OC/MC concerned should be informed and remedy suggested. Legislative amendments should be introduced to authorise HAD to monitor the operations of OCs/MCs and investigate into

complaints and reports of possible non-compliance with the BMO.

(b) HAD should establish a statutory mediation mechanism and provide mediators for such purpose.

(c) As some building management disputes arise from loopholes in the BMO, legislative amendments should be introduced to plug them.

(d) Owners should, on payment of reasonable copying charges, be supplied with copies of any documents in the possession of the OCs and building managers in relation to the management and maintenance of their building.

(e) HAD staff should play the role of a neutral third party, instead of just an observer, at OC/MC meetings and advise OCs/MCs what legislative provisions they have to comply with and what legal responsibilities they have to bear.

(f) HAD staff are often unable to resolve disputes

between owners and OCs as they are reluctant to say who is right and who is wrong.

DISTRICT COUNCILS

4.3 From May to July 2003, HAD consulted the 18 District Councils on its proposed amendments to the BMO. Views expressed by DC Members are summarised below :

(a) HAD should strengthen its supervisory role over the operations of OCs/MCs in order to protect the interests of owners. The BMO should be amended to empower HAD to do so.

(b) The BMO should be amended to enable HAD to deal with OCs/MCs which fail to comply with the legal requirements in the BMO. Penalties should be imposed for contravention. HAD should be empowered to give direction to OCs/MCs in case of non-compliance.

(c) In order to enable owners to better monitor the operations of their OC/MC, they should be allowed, on payment of reasonable copying charges, to obtain copies of any documents

in the possession of the OC/MC or the building manager in relation to the management and maintenance of the building.

(d) The BMO should provide for a statutory mediation or arbitration mechanism in order to resolve building management disputes more efficiently and effectively.

(e) The proceedings in the Lands Tribunal should be simplified. Legal representation should not be allowed in the Tribunal's proceedings.

(f) HAD should set up a legal action fund to assist owners in bringing lawsuits against OCs/MCs.

FOCUS GROUP DISCUSSIONS

4.4 From late October to mid-November 2002, HAD convened four focus group meetings with representatives of DCs, OC associations and professional bodies, for feedback and suggestions on HAD's building management services. Relevant views expressed are summarised below :

(a) Government should be empowered to monitor the

operations of property management companies.

(b) HAD should monitor the operations of OCs/MCs to ensure that they comply with the legal requirements under the BMO. In case of non-compliance, HAD should be empowered to direct the OC/MC concerned to carry out its statutory duties.

(c) Government should be empowered to mediate or arbitrate on building management disputes.

(d) HAD should set up special units at the BMRCs or DOs to mediate in building management disputes. Such mediation units should consist of HAD staff, DC Members and professionals.

COMMON CONCERN

4.5 It is evident from the foregoing paragraphs that there is a common concern over :

- Government's role in monitoring the operations of OCs/MCs for the interest of owners

- whether Government is suitably empowered to perform this role
- the adequacy and effectiveness of avenues for resolving building management disputes

5

CASE STUDIES

5.1 This Chapter looks at how in practice HAB and HAD handled public requests for enforcement and analyses public complaints received by the LegCo Secretariat and this Office on the subject.

PUBLIC REQUESTS FOR ENFORCEMENT

Requests for Prosecution

5.2 Between August 2000 and July 2003, HAD handled three cases involving six requests from owners of two buildings for prosecution under the BMO. All the requests related to allegations of breach of section 27(1) of the BMO - failure of the MCs to prepare and table the OC income and expenditure accounts and balance sheets at general meetings of the OCs. We have examined the case files.

5.3 In **the first case**, the owner made his request to HAB in December 2000. HAB promptly acknowledged it and referred it to HAD for investigation. However, the request was somehow

mislaid and went unnoticed until the owner chased for a reply some 29 months later. The Department found that the income and expenditure accounts and balance sheets had in fact been tabled at general meetings of the OC. In the absence of *prima facie* evidence of contravention, HAD turned down the request in August 2003, some 32 months after the owner made his request. The Department apologised to him for the delay in replying.

5.4 In **the second case**, a group of owners made three requests in 2½ months. In reply, HAD assured them that it had reminded the MC of the requirements of section 27(1).

5.5 In **the third case**, an owner made two requests for prosecution. The first was made to HAB in January 2002. On investigation, there was *prima facie* evidence that the MC had breached section 27(1). However, HAB turned down the request in March 2002 on the grounds that the MC had appointed an accountant to audit the OC accounts and that the MC had displayed a summary of the income and expenditure account of the OC every quarter. HAB then issued a follow-up letter in April 2002 to remind the MC of the legal requirements of section 27(1) and the consequence of breach. That was followed by HAD's letter of May 2002 urging the MC to take early action to comply with section 27(1) and threatening prosecution action under section 27(3) if the MC failed to respond within 14 days.

5.6 In June 2002, the MC took the former MC chairman and the former MC treasurer to the Lands Tribunal for their failure to sign on the previous OC accounts. In this light, HAD withheld prosecution.

5.7 Later, as the MC still did not take any action to comply with section 27(1), the owner made a second request to HAB in August 2002. In November 2002, the Lands Tribunal ruled that the incumbent MC chairman and MC treasurer, instead of their predecessors, should sign on the previous OC accounts. In December 2002 and March 2003 respectively, HAB and HAD wrote to the MC chairman, quoting the judgment of the Lands Tribunal and urged the MC again to comply with the requirements of section 27(1). However, both letters did not impose any deadline for compliance or give any warning of possible prosecution for continuing breach.

5.8 As both HAB and HAD took no action to prosecute the MC, the owner filed a case with the Lands Tribunal in July 2003 against the MC for not providing the books of account of the OC for his inspection, in breach of section 27(2), and failing to table the OC income and expenditure accounts and balance sheets at general meetings of the OC, in breach of section 27(1).

5.9 It took HAD 15 months to reply to the owner's second request of August 2002. In its reply of November 2003, HAD stated that it had refrained from taking any action because the owner had already brought the case to the Lands Tribunal for adjudication. The Department apologised for the delay in replying and explained that it had been due to the reshuffling of duties among HAB and HAD and misdirection of internal mail.

5.10 We note that :

(a) The owner had between November 2000 and May 2003 made some ten written requests to the MC for inspection of the books of account of the OC, but in vain.

(b) HAB/HAD had issued six written and numerous verbal reminders urging the MC to comply with section 27(1) of the BMO, but also unsuccessful.

(c) Although the Lands Tribunal had delivered its judgment in mid-November 2002, the MC still failed to table the OC accounts at three subsequent general meetings of the OC in late November 2002, March 2003 and July 2003.

(d) The MC had included an agenda item to lay the OC accounts at three general meetings of the OC. However, the item was cancelled by the MC chairman at two of the meetings, and the other meeting was called off due to lack of a quorum.

(e) In September 2003, more than 5% of the owners requested the MC chairman to convene a general meeting of the OC under paragraph 1(2) of the Third Schedule to discuss the dissolution of the MC, but to no avail. An owner took the MC chairman to the Lands Tribunal on this issue. After several hearings, they reached a settlement to convene a general meeting of the OC in March 2004.

(f) Numerous owners complained bitterly to DHA, SHA and the Chief Executive for the failure of HAD/HAB to take prosecution action against the MC, but also to no avail.

(g) The MC eventually tabled the income and expenditure account and balance sheet of the OC for the period from 1 July 2000 to 30 June

2001 at a general meeting held in October 2003, but not those accounts and balance sheets pertaining to the rest of 2000 - 2003.

(h) At the general meeting of the OC held in March 2004, the owners resolved to dissolve the MC and appoint an administrator. The administrator convened another meeting in April 2004. The owners present appointed a new MC with the administrator as the chairman.

5.11 In deciding not to recommend prosecution, HAD had considered the three factors prescribed by its guidelines (paragraph 3.7). Its analysis was as follows :

(a) Nature of the offence - The information provided by the owner was limited and there was no substantial evidence of, say, fraud. The significance of the offence could not be established.

(b) Intention of the offenders - HAD had repeatedly reminded the MC and it was well aware of the requirements of section 27(1).

(c) Public interest - If deception had been found,

it would have been in the public interest to prosecute; in which case, prosecution would not have a negative effect of deterring people from taking part in building management.

We appreciate the need to address all relevant considerations. However, we outline our views on the case below.

5.12 On the intention of the offenders (factor (b)), HAD had repeatedly reminded the MC of the legal requirements and the importance of compliance. The MC had been given ample time to rectify its non-compliance. There could be no question of "oversight" by the MC in this case. *Prima facie*, the offence was intentional.

5.13 We are, however, puzzled by HAD's interpretation of the nature of the offence (factor (a)) and public interest (factor (c)).

5.14 Under section 27(1), an MC has a statutory duty to keep proper books of account and to table income and expenditure accounts and balance sheets at general meetings of the OC. The fact that failure to observe section 27(1) is a punishable offence under section 27(3) signifies the importance of compliance. When considering the need for prosecution under s.27(3), it is not appropriate or relevant for HAD to examine

the likelihood of other more serious offences (such as fraud) having been committed at the same time. Owners have a legitimate expectation that their MC carries out its duty under section 27(1) and that SHA as the Authority for the BMO ensures that the law is observed. Viewed from this angle, all owners are victims if they are deprived of their legal right to be informed of the financial situation of their OC and no effective assistance from HAB/HAD is forthcoming. The MC's continuing breach of section 27(1) is, therefore, a blatant offence.

5.15 We consider it an important aspect of Government's enforcement of the BMO to be taking prosecution action, particularly against blatant offenders. This is necessary in order to uphold the interests of individual owners and to bring to book those abusing the powers of OCs/MCs. This should in no way deter responsible and conscientious owners from participating in voluntary building management services in their own interests. On the contrary, HAB's/HAD's obvious reluctance to institute prosecution even in the face of blatant offenders would only encourage non-compliance and engender defiance of the law. This is certainly not in the public interest.

Requests for Invoking SHA's Powers

5.16 During the period between August 2000 and July 2003,

HAD handled six cases involving eight requests from owners of four buildings for invoking SHA's powers. We have examined all the case files. The nature of the requests is as follows :

Table 2

Nature of Request*	Number of Requests
section 40A	4#
section 40B	2
sections 27(2) and 40A	1
sections 40A and 40B	1

* See paragraph 2.9 for details of the relevant sections of the BMO.
\# One owner made three requests in four months.

Source : HAD

All requests were turned down for the same reason : the state of the building did not warrant the invocation of SHA's powers. However, it was not clear what might warrant invocation.

PUBLIC COMPLAINTS

Complaints Received by LegCo Secretariat

5.17 Between January 2000 and July 2003, the LegCo

Secretariat received 11 complaints relevant to this investigation, as follows :

(a) SHA is not empowered to monitor the operations of OCs/MCs and building managers or to resolve disputes among OCs/MCs, building managers and owners.

(b) There is no effective avenue for owners and OCs/MCs to deal with and resolve disputes over building management and maintenance issues.

(c) Meetings of owners were not convened and appointment of MCs and election of MC members not conducted in accordance with the provisions of the BMO.

(d) Accounts of OCs were not in order and MCs failed to disclose books of account as required under the BMO.

(e) Some MC chairmen failed to convene general meetings of the OCs in accordance with the provisions of the BMO despite requests from not less than 5% of the owners.

Complaints Received by This Office

5.18 Between August 2000 and December 2003, this Office handled 19 complaints relevant to this subject, six of which found to be substantiated or partly substantiated. HAD and its staff were the subject of complaint for :

(a) giving inappropriate advice or failing to give advice at OC/MC meetings;

(b) delaying, or being evasive in, handling complaints;

(c) failing to handle complaints properly or to resolve disputes satisfactorily;

(d) failing to assist owners in supervising the operations of OCs/MCs; and

(e) failing to enforce the provisions of the BMO governing the operations of OCs/MCs.

6

OBSERVATIONS AND OPINIONS

GENERAL

6.1 Throughout our investigation, HAD has emphasised that it plays a liaison and advisory role in private building management. The main duties of its staff are to assist owners in the formation of OCs and advise them on the proper discharge of their building management responsibilities. Earlier, this Office has studied HAD's performance in these two areas and made some recommendations in our direct investigation reports published in March and November 2003 respectively. Our present investigation has raised questions over the efforts and effectiveness of HAB and HAD in their enforcement of the BMO.

6.2 We firmly support Government's principle that owners should be responsible for the good management and timely maintenance of their own property. This is only natural and fair as the owners themselves enjoy the benefits of a well-kept building and a safe living environment. We also endorse HAD's view that owners and occupants should manage their own buildings

with Government intervening only when there is a need (paragraph 3.11). However, the records show that, in fact, not only has Government not intervened even in cases of need but it has actually left offenders untouched and the law unenforced. This casts doubt on :

- whether Government was serious in seeking the powers under the BMO for SHA
- why Government bothered to legislate at all for control of OC/MC operations

6.3 We have noted, in Chapter 4, that there is strong public demand for Government to step up the monitoring of OC/MC operations and enforcement of the BMO. Against this background, we have come up with some observations and opinions.

INSPECTIONS

6.4 HAD maintains that owners should be responsible for monitoring the operations of their OC/MC. The Department cannot, and should not be expected to, ascertain cases of non-compliance with the BMO just by the one or two site visits and meetings by its staff each year. Meanwhile, owners' reports or complaints to OCs/MCs on non-compliance should serve to remind them of their legal responsibilities and the importance

of compliance.

6.5 We cannot accept HAD's argument completely. While it is true that non-compliance with some legal requirements may be difficult to ascertain through one or two site visits or meetings, others are readily identifiable. Examples are :

- failure to display a copy of the certificate of registration of the OC (in breach of section 11(1))
- failure to table income and expenditure accounts and balance sheets at general meetings of the OC (in breach of section 27(1))
- failure to display certified minutes of MC meetings (in breach of paragraph 10(4B) of the Second Schedule)
- failure to display certified minutes of OC meetings (in breach of paragraph 6(3) of the Third Schedule)
- failure to display quarterly summaries of income and expenditure of the OC (in breach of paragraph 2 of the Sixth Schedule)

6.6 Not familiar with the provisions of the BMO, many owners may not be sufficiently aware to notice and report non-compliance. Since HAB/HAD has an enforcement role under

the BMO, HAD staff should be on the look-out for non-compliance proactively during site visits and meetings. With the Department's resource constraints, focus on blatant breach of the BMO should help deter non-compliance and reduce the need for enforcement. Proper guidelines and procedures should be drawn up for vigilant checks and appropriate follow-up action.

6.7 HAD has published a booklet on "Building Management" to provide general guidance on various aspects of OC/MC operations. However, the booklet fails to offer ready reference for OCs/MCs on the key requirements of the BMO. HAD should either produce a separate guide on the BMO or revise the existing booklet for OCs'/MCs' clearer understanding of, and compliance with, the BMO.

HANDLING OF REQUESTS AND COMPLAINTS

Requests for Prosecution

6.8 The case described at length in paragraphs 5.5 to 5.10 was clearly a case of blatant breach. The MC concerned had been repeatedly reminded to comply with section 27(1) of the BMO before, and even after, the Lands Tribunal's judgment. Although given ample time to rectify, the MC still refused

to heed HAD's advice or obey the law; it even ignored the judgment of the Lands Tribunal. One would have thought that HAB/HAD had every reason to enforce the BMO and institute prosecution against the MC concerned. It is most disappointing that HAB/HAD had made no attempt to do so.

6.9 We have studied how HAD interpreted the three factors affecting recommendations for prosecution and translated them into action (paragraphs 5.11 to 5.15). We appreciate the need for these considerations but HAD's appraisal is tantamount to inaction. It seems to us that HAB/HAD has adopted an attitude of indefinite, or even infinite, latitude towards the non-compliant. The result is total absence of any enforcement or much semblance of such intention.

6.10 Blatant offenders who ignore HAD's repeated advice and warning go scot-free. We consider that there should be a balance of interests : individual, group and public. Clearly, alleged or suspected offenders should be given the chance to defend themselves and amend their warp. However, in the face of persistent and blatant offences, group (i.e. other owners') concern must also count, for they are joint "stakeholders" and have legitimate interests in their building. In the final analysis, consistent non-enforcement is not in the public interest : it can only breed disregard for enforcement and disrespect for the law.

6.11 The first principle of legislation is not to legislate unless the law can be, and will be, enforced when the situation warrants. Government's message over the decades, and particularly in recent years, has been and remains that responsibility for good building management rests with owners and that Government (notably through HAB/HAD) will support responsible owners. Allowing blatant breach of the BMO to go unchecked is not in accord with either the basic principle of legislation or Government's declared policy.

6.12 We have examined HAD's prosecution guidelines (Annex 4). We note that the guidelines have not spelt out clearly when SHA's powers under the BMO should be invoked for the purpose of investigating an allegation. In the handling of one case, there were different opinions within HAD as to whether and when section 40A (or other sections) should be invoked. The guidelines have also not made specific reference to the role of D of J and when it should be consulted.

6.13 We have also looked into how HAD actually processed the requests for prosecution. We have found that all such requests were in practice only put to directorate officers at D2 level in HAB/HAD for decision. This is not only contrary to the instruction in the guidelines that all requests for prosecution should be minuted to SHA for his personal decision

(paragraph 3.8) but also places upon relatively junior, albeit experienced, officers a burden not meant for them to carry. HAD explains that the cases were not submitted to SHA as they did not merit the exercise of his powers. If a case were assessed to merit such attention, SHA would be requested to decide on the case. Records show, however, that even blatant and repeated offences had not been seen to "merit" such treatment. HAB/HAD should not be so passive over owners' reports and complaints, which should deserve positive consideration and exercise of powers under the BMO where due.

6.14 We find it inappropriate of HAB/HAD staff, especially at relatively junior levels, to have screened out all the cases and without proper delegation of authority from SHA. We are surprised that HAD has not seen fit ever to inform SHA of the handling of such cases. This, in our view, is equivalent to usurping SHA's position and acting without authority. Proper delegation of authority should be made and SHA regularly apprised of the exercise of such delegated authority.

Requests for Invoking SHA's Powers

6.15 In deciding whether section 40A should be invoked, HAD would consider if there is *prima facie* evidence that any provisions of the BMO have been breached or that there are

serious management problems in the building (paragraph 3.15). This is a logical, and prudent, step before deciding whether prosecution action should be instituted or whether section 40B or 40C should be invoked. However, it is not clear how HAD determines the degree or extent of management problems.

6.16 HAD also explains that any information or documents obtained under section 40A are to be used by SHA only and not to be divulged to owners of the building concerned. In other words, section 40A is not a tool for individual owners to obtain information or documents prepared or possessed by their OC/MC (paragraph 3.14). Such important considerations and constraints should be clearly spelt out in the relevant guidelines (Annex 5).

6.17 The guidelines require that all requests for invoking section 40A be minuted to SHA for his personal decision. However, in practice, all requests were screened out by Senior Liaison Officers in HAD HQ or DOs instead. Again, HAD reiterates that cases which merit SHA's attention would be submitted to him for decision. This is fine in theory but clearly not so in practice from our case studies. HAB/HAD should review this screening arrangement and introduce proper delegation of authority and effective monitoring of its exercise. There should be a mechanism for regular reporting to SHA.

6.18 We also note that there were serious delays in processing and replying to some requests for prosecution (paragraphs 5.3 and 5.9). To prevent recurrence, HAD should put in place administrative measures to ensure proper and timely handling of such requests. In particular, the following should be incorporated into the guidelines :

- pledges for issue of interim and substantive replies
- a system for monitoring case progress and identifying delays
- a system for keeping the requestor informed of progress and offering an explanation in case of delay
- workflow diagrams

Complaints Alleging Non-compliance

6.19 Except for nine offences punishable under the BMO (Annex 2), most of the legal requirements governing the operations of OCs/MCs do not carry sanctions. In other words, there is no penalty for non-compliance. Examples are :

- the MC failing to allow owners to inspect the books of account of the OC (in breach of

section 27(2))

- the MC secretary failing to display a certified copy of the minutes of an OC/MC meeting within 28 days of the date of the meeting (in breach of paragraph 6(3) of the Third Schedule or paragraph 10(4B) of the Second Schedule)
- the MC treasurer failing to supply owners with a copy of the budget of the OC (in breach of paragraph 4 of the Fifth Schedule)
- the MC treasurer failing to supply owners with a copy of the income and expenditure account and balance sheet of the OC (in breach of paragraph 3 of the Sixth Schedule)

6.20 For disputes relating to such cases of non-compliance, HAD can only give advice or conduct informal mediation but cannot arbitrate or prosecute offenders (paragraph 3.21). In recent years, HAD has been actively promoting corporate governance of OCs and reinforcing its training of MC members. These activities have helped to enhance awareness of cooperative management and to avoid some disputes. HAD should keep up these good efforts.

6.21 Where mediation fails, HAD would advise owners to request the MC chairman to convene a general meeting of the OC (paragraph 1(2) of the Third Schedule) or to bring their

disputes to the Lands Tribunal for adjudication (section 45 and the Tenth Schedule). In theory, these avenues could go a long way towards resolving disputes. In practice, there are inherent drawbacks and limitations as well as malpractices, as detailed in paragraphs 6.35 to 6.39 and 6.42 to 6.43 below.

6.22 We have examined HAD's instructions for handling building management complaints (Annex 6). Our observations are as follows :

(a) The instructions do not specifically deal with complaints about non-compliance with the BMO. In particular, there is no reference to the investigation of alleged offences or requirement for reminders and warnings when *prima facie* evidence of a breach is established.

(b) Statistics on the number and nature of complaints, follow-up actions and outcome are not required to be systematically kept, analysed and reported.

(c) Except for the requirement to register all complaints received, there is no reference to any system for monitoring case progress.

6.23 Complaints to HAB and HAD should prompt SHA and DHA to defects. Repeated complaints should alert SHA and DHA to serious persistent problems. HAD has laid down requirements for management information and supervision of public complaints in paragraphs 18 and 19 of its Standing Circular No. 16/2000 on the handling of complaints by members of the public. A copy of the Circular is at **Annex 7**. The omissions cited at (b) and (c) above are not consistent with such requirements.

RESOLUTION OF DISPUTES

Non-statutory Avenues

6.24 Mediation has obvious advantages over litigation. It can resolve a dispute more speedily, at lower cost and without damage to the relationship of the parties involved. The process is confidential, with rules and procedures being kept simple and flexible. The parties, coming forward with goodwill, stand a better chance of negotiating a mutually agreeable outcome.

6.25 HAD has been conducting a pilot scheme to assess the effectiveness of mediation in resolving building management disputes (paragraph 3.29). However, the results

have not been encouraging. Since July 2002, five cases have gone through mediation and only two have been successfully resolved (paragraph 3.32).

6.26 HAD explains that the greatest difficulty encountered is to convince the parties concerned to agree to resolve their dispute by mediation. The parties often have a history of adversarial relations or even litigation.

6.27 For these reasons, HAD considers that mediation cannot apply to all building management disputes. Moreover, although OCs/MCs legally represent all owners of a building, a small group of owners serving as MC members find it difficult, if not impossible, to make decisions at the mediation table on behalf of all owners.

6.28 We fully recognise the limitations of mediation and do not see it as a panacea for all building management disputes. However, the successful resolution of two disputes under the pilot scheme argues for the use of mediation in resolving at least some types of building management disputes. With the experience gained from the pilot scheme, HAD should come up with typical scenarios where mediation could be best employed.

6.29 We have looked closely into the conduct of the pilot mediation scheme and observe that :

(a) Cases selected by the Joint Assessment Panel for mediation under the pilot scheme are limited to those which can be completed within 3½ hours, which is a relatively short time.

(b) HAD does not have a comprehensive plan for the scheme.

(c) HAD has not produced dedicated pamphlets to promote the scheme.

6.30 HAD explains that complicated cases which cannot be completed within 3½ hours have to be dealt with by paid mediators (paragraph 3.31). We consider that since this time limit is barely adequate even for simple and straightforward cases, it does not give mediation a fair chance to succeed or to be more fully tested.

6.31 HAD regards its role in the scheme as facilitator-cum-coordinator only. Operational details of the scheme were mainly derived from discussions with the two participating mediation bodies. Consequently, no departmental guidelines or operational plan were deemed necessary. Moreover, we note a lack of such important elements in the scheme as :

- the criteria for the selection of cases for referral to the Joint Assessment Panel; and
- the mechanism for soliciting and evaluating user feedback.

This is clearly not good enough for a fair trial scheme.

6.32 While HAD has made available pamphlets of the two participating mediation bodies at BMRCs, these pamphlets do not contain specific information on the pilot scheme itself and are thus unable to encourage utilisation.

6.33 On the other hand, we note that the Judiciary has set up a Mediation Co-ordinator's Office to administer a pilot scheme on family mediation. It has worked out clear guidelines and detailed procedures for the scheme. It has also produced a dedicated pamphlet to explain in detail its operations and advantages. These pamphlets are distributed to the target clientele of the scheme : petitioners, respondents and applicants for matrimonial proceedings at the Family Courts. The Judiciary's experience offers much useful reference for HAD.

6.34 In view of the inadequacies identified, we consider that the HAD pilot scheme in mediation has not been fully tested. HAD should review the scheme, take reference from the

Judiciary's preparations and administrative arrangements and extend the duration of the pilot scheme to give mediation a proper trial.

Statutory Avenues

To Convene a General Meeting of the OC

6.35 While the provision for not less than 5% of the owners to request a general meeting of the OC may help to resolve some disputes between owners and their OC/MC, it does have limitations and drawbacks.

6.36 **Firstly**, it may be difficult to obtain the consent of not less than 5% of the owners. This is particularly true when the issue or dispute at hand concerns or affects only a small number of owners or where most of the occupants are tenants rather than owners.

6.37 **Secondly**, even if there are not less than 5% of owners supporting the request, they may not be able to form a quorum for the meeting (10%, or 20% if dissolution of the MC is proposed).

6.38 **Thirdly**, only the MC chairman has the power to convene a general meeting of the OC. There is no penalty if the MC

chairman refuses to do so. When sensitive issues such as the removal of the MC chairman or dissolution of the MC are raised by owners, their requests are more likely to be refused.

6.39 Reluctant MC chairmen may also employ various tricks or tactics to delay or frustrate legitimate requests of owners.

6.40 HAD is well aware of these tricks but is unable to offer help except to advise the owners concerned to bring their cases to the Lands Tribunal. HAD does not have statistics on such irregularities but we believe that they are not uncommon.

6.41 To protect the interests of individual owners, HAB/HAD has a duty to plug these loopholes and address potential conflict of interests of the MC chairman. There is a suggestion that SHA should be empowered to order an MC to convene a general meeting of the OC for specified purposes, in case a legitimate request from owners for such a meeting is unreasonably refused or frustrated. We think this is a good suggestion which HAD should consider seriously.

Adjudication by Lands Tribunal

6.42 Lands Tribunal offers a useful alternative to convening a general meeting of the OC. However, there are drawbacks and limitations in litigation as a forum to resolve

conflicts. It can be more costly and time-consuming as legal formalities still apply. Private matters are disclosed in the public arena. The range of solutions is limited and the outcome not predictable. Neighbourly relationship is prone to damage under a "win-lose" situation. This is not conducive to a harmonious living environment and neighbourliness, a value much promoted by HAD. Worse, the losing party may appeal to a higher court, adding even greater burden on cost, time and energy. In brief, many owners see this as a nightmare.

6.43 Furthermore, OCs/MCs and individual owners often do not have equal financial or information bases. Owners challenging their OC/MC in litigation may find that :

(a) the OC/MC makes use of the building's management funds to engage lawyers to defend itself; and

(b) the OC/MC is often in possession of vital information not available to the owners.

For these reasons, owners who may have a case in hand are often reluctant to bring it to the Lands Tribunal for adjudication.

6.44 In this light, many in our community have called for simplifying the mechanism for adjudicating building

management disputes. Two suggestions have come up :

(a) the setting up of a Building Management Tribunal dedicated to building management disputes; and

(b) the setting up of a "Wise Men Panel" to arbitrate on minor building management disputes.

6.45 The idea of a dedicated Building Management Tribunal is modeled on the Labour Tribunal, which specifically deals with employment claims and disputes. The Labour Tribunal adopts simple judicial proceedings, and legal representation is not allowed. It can indeed provide a good example where disputes are resolved in a quick, inexpensive and informal manner.

6.46 HAD first raised the idea of setting up a "Wise Men Panel" at an internal meeting held in late 2002. The proposed Panel is to be drawn from representatives of professional bodies and DC Members on rotation. However, little progress has been made since the idea was raised. HAD explains that the proposal involves legislative amendment and financial implications and, therefore, needs careful consideration and wide consultation.

6.47 Both suggestions merit further consideration by HAD. We urge HAD to expedite discussion and consultation with parties concerned and develop an early proposal for a simple and effective mechanism for adjudicating building management disputes.

7

CONCLUSIONS AND RECOMMENDATIONS

GENERAL

7.1 On the basis of our observations and opinions in Chapter 6, we have arrived at the following conclusions and recommendations on HAB's/HAD's enforcement of the BMO.

CONCLUSIONS

7.2 Our conclusions are :

(a) HAB/HAD has failed to enforce the provisions of the BMO.

(b) HAB's/HAD's guidelines and procedures for enforcing the provisions of the BMO are either inadequate or non-existent.

(c) HAD has been "deciding" on requests for enforcement without proper delegation of authority or reporting to SHA.

(d) SHA, as the Authority for the BMO, has not shown sufficient interest in the enforcement of the Ordinance or monitored HAD's execution on his behalf.

(e) HAB/HAD has no statistics or firm data to help formulate an efficient and effective strategy for handling building management disputes.

(f) The use of mediation as a means of settling building management disputes has not been fully tested.

(g) There are deficiencies in the BMO which have been exploited by a small number of persons. HAD is not sufficiently empowered to protect the interests of individual owners in the face of such exploitations.

(h) The present mechanism for adjudicating building management disputes is not

sufficiently user-friendly.

RECOMMENDATIONS

7.3 Against this background, The Ombudsman makes the following recommendations to HAB and HAD :

Enforcement

(a) To look out proactively for non-compliance and draw up clearer guidelines and procedures for checks and follow-up action (paragraph 6.6).

(b) To promote among OCs/MCs and owners better understanding of the BMO by producing a separate guide or revise the existing one (paragraph 6.7).

(c) To review and revise HAB's/HAD's interpretation of the factors affecting recommendation for prosecution in the guidelines and to take prosecution actions against blatant offenders accordingly (paragraphs 6.9 to 6.11).

(d) To make reference in the guidelines to SHA's powers of inspection under the BMO and D of J's role in prosecution (paragraph 6.12).

(e) To spell out clearly in the guidelines the important considerations and constraints for invoking section 40A (paragraphs 6.15 and 6.16).

Systems and Procedures

(f) To make proper delegation of authority for processing requests for enforcement and to devise systems for regular reporting to SHA on the exercise of such delegated authority (paragraphs 6.14 and 6.17).

(g) To introduce administrative measures, including pledges for issue of replies, into the guidelines to ensure proper and timely handling of requests for enforcement (paragraph 6.18).

(h) To draw up specific instructions on the handling of complaints of non-compliance and

take steps to ensure timely processing of such complaints and proper keeping and analysis of relevant statistics and data (paragraphs 6.22 and 6.23).

Mediation

(i) To extend the pilot scheme in mediation and to improve its operations so as to properly try out public acceptance and effectiveness of mediation in resolving building management disputes (paragraphs 6.29 to 6.34).

Statutory Avenues

(j) To amend the BMO to enable the Authority to order an MC to convene a general meeting of the OC for specified purposes (paragraph 6.41).

(k) To expedite discussion and consultation with parties concerned and develop an early proposal for a simple and effective mechanism for adjudicating building management disputes (paragraph 6.47).

8

FINAL REMARKS

8.1 HAD has commented on our draft report and updated statistics. We have, where appropriate, incorporated its suggestions for factual and textual amendments into this report. On HAD's other major comments, we have the response below.

HAD's Comments and Our Response

8.2 HAD agrees that its internal guidelines (Annex 4) have not set out clearly the procedures for handling requests for prosecution under the BMO. In consultation with D of J, the Department will suitably revise the guidelines, taking into account our recommendations.

8.3 As for invocation of SHA's powers under section 40A and other sections of the BMO, HAD fully shares our view that proper delegation of authority to other officials in HAB and HAD should be made to facilitate collection of evidence in cases of alleged breach of the BMO. Any case with *prima facie* evidence will be submitted to D of J for a decision. The Department is now actively pursuing these matters with D of J.

8.4 Concerning our observations in paragraph 6.39 that some MC chairmen employ various tricks or tactics to delay or frustrate legitimate requests of owners for convening general meetings of OCs, HAD admits that it may not be able to offer assistance to owners in some of the circumstances. However, the Department emphasises that these tactics are adopted by only a handful of MC chairmen. Besides, some delays may have genuine and practical reasons and are not necessarily tricks used by the chairmen.

8.5 On this point, we trust that HAD would do its best to advise and assist MC chairmen in solving any genuine and practical problems that may arise.

8.6 We note HAD's undertaking to carefully consider all our recommendations in paragraph 7.3 and to work out how best to implement them.

8.7 We are pleased that HAD has responded positively to our report in general and our recommendations in particular. HAB and HAD should keep this Office informed of progress on the implementation of the recommendations and any major change in policy, procedures or practices. We will follow up with HAB and HAD every six months.

9

EPILOGUE

9.1 Good building management has been a matter for Government attention since the 1970's. In the new millennium, Government's implementation strategy on building safety and timely maintenance in April 2001 and the outbreak of the Severe Acute Respiratory Syndrome in early 2003 have brought into even sharper focus the importance of effective management for a safe and hygienic living environment. We firmly support Government's emphasis on this key aspect of our community life.

Rounding Off

9.2 Against this background, we have examined Government services and actions in building management by three direct investigations :

	Subject	Published
I	Role of HAD in facilitating formation of OCs	March 2003
II	Assistance by HAD to owners and OCs in managing and maintaining their buildings	November 2003
III	Enforcement of the BMO	June 2004

9.3 We take this opportunity to sum up briefly our findings and overall impressions from these three investigations :

(a) Formation of OCs

- The increase of new OCs was a mere 1% even after a lowering of the requirement from 50% to 30% of owners' shares for OC formation in 2000 and a considerable increase in staff resources in 2001.
- HAD's assistance to owners fell short of their expectations.
- There was much room for service improvement and for speeding up OC formation as a large number of private buildings have yet to incorporate themselves for organised action in management.

(b) Support and Services to OCs

- In view of community criticism of HAD staff being not sufficiently professional or full-time, Government had in 2001 allocated $43.9 million a year for 90 posts to address these deficiencies.

- Regrettably, HAD started in early 2003 to delete by phases professional and housing grade posts.
- This was tantamount to turning the clock back and partially rescinding Government's strategy of April 2001 (paragraph 9.1).

(c) Enforcement of BMO

- HAB/HAD have not enforced the BMO even when confronted with a blatant breach.
- SHA has not shown much interest in enforcement or given HAD sufficient guidance in execution, and has not even delegated the authority to HAD.
- Enforcement procedures are inadequate or non-existent.

9.4 For ease of reference, our recommendations based on the first and second investigations are reproduced at **Annexes 8 and 9** of this report. Those on the present investigation are in paragraph 7.3 of the report.

9.5 It is evident that there has been no serious attempt to enforce the BMO. Even clearly blatant breach of the law has not persuaded the authorities to take prosecution action. There is an apparent lack of will, or courage, to take that step. Consequently, questions are raised as to Government's

sincerity and determination in its pronouncements on building management over the years. These are perceived by many in the public as merely lip service and empty promises.

9.6 Such perceptions are most unfortunate, as is the organisational culture of "positive non-intervention" permeating from HAD HQ to the DOs.

Recent Developments

9.7 Since the publication of our first investigation report, HAD has been improving its building management services :

- extending the opening hours of BMRCs;
- revamping its guides and website on building management to be more informative and easier for use;
- producing more guidelines and checklists for owners and OCs/MCs;
- strengthening training programmes;
- stepping up publicity on services; and
- improving the support and training for frontline staff.

These should foster a more client-oriented service culture

in the Department.

9.8 Regrettably, the phased deletion of virtually all professional and housing grade posts as an economy measure has diluted staff expertise and adversely affected the quality of services. Unless HAD is able to make up for this loss, maintenance of its service standards in building management will be at risk, contrary to Government's intention.

Looking Ahead

9.9 Public consultation on HPLB's proposals to improve building management and maintenance (paragraphs 2.19 and 2.20) has just ended. The Bureau is now actively analysing the views collected. The community awaits its final proposals to promote effective management and proper maintenance of buildings.

9.10 We appreciate HAB and HAD's acceptance of our reports and recommendations. We hope that HAB and HAD, as the authorities for building management, review their attitude and revise their approach to the BMO and related matters. A new culture must evolve to inspire staff and to reassure responsible OCs/MCs, to deter uncooperative owners and to bring to book those in breach of the law. This is the challenge of change Government must take up to ensure a safe and healthy living environment.

- E N D -

Office of The Ombudsman

Ref. OMB/DI/117

June 2004

ANNEXES

Annex 1

Organisations with which this Office has held discussions

(A) Home Affairs Department

Headquarters

Building Management Division

District Offices

Eastern District Office
Sha Tin District Office

(B) Other Government Department

Mediation Co-ordinator's Office of the Judiciary

(C) Professional Bodies

Hong Kong Mediation Council
Hong Kong Mediation Centre

Offences

2.3 The BMO stipulates the following 9 offences each with a penalty clause :-

(a) An OC is guilty of an offence if it fails to change its name within a specified period as directed by the Land Registrar. The OC is liable on conviction to a fine of $50 for each day during which the contravention continues — Section 10(3)

(b) Every member of the MC is liable on conviction to a fine of $50 if the MC fails to display the certificate of registration (issued by the Land Registrar) at a prominent place in the building — Section 11(3)

(c) The Secretary of the MC is guilty of an offence if he fails to give notice to the Land Registrar within 28 days of the date of any change in the registered particulars and is liable on conviction to a fine of $100 for each day during which the contravention continues — Section 12(4)

(d) Every member of the MC is liable on conviction to a fine at level 5 if MC fails to maintain proper books or records of account and to prepare within a specified period an income and expenditure account and a balance sheet for presentation at the annual general meeting of OC — Section 27(3)

(e) The administrator (appointed by the court to replace the MC) is guilty of an offence if he, within seven days of the date of his appointment or the determination of his appointment, fails to give notice to the Land Registrar, and is liable on conviction to a fine of $100 for each day during which the contravention continues — Section 32(3)

(f) A person is liable on conviction to a fine at level 3 if he, not being a corporation incorporated under BMO, uses a name or title containing the — Section 35

Source: Chapter 2,
Operational Manual on Building Management for Liaison Officers

words "Incorporated Owners" or "Owners' Corporation" or the Chinese characters implying that such person is a corporation incorporated under the BMO

(g) A person is liable on conviction to a fine at level 3 and to imprisonment for six months if he knowingly makes a false statement or furnishes false information	Section 36
(h) A person is liable to a fine at level 4 if he obstructs or fails to comply with a reasonable requirement of the Authority or an authorized officer	Section 40A(2)
(i) Every member of the MC is liable on conviction to a fine at level 5 and in the case of a continuing offence, to a further daily fine of $1,000 for each day during which the offence continues if a MC without reasonable excuse fails to comply with an order made under Section 40(B)(1)	Section 40(B)(2)

Provision for fines for offences under the Criminal Procedure Ordinance, Cap. 221

Level applied	Fines
Level 1	$ 1 to $ 2,000
Level 2	$ 2,001 to $ 5,000
Level 3	$ 5,001 to $ 10,000
Level 4	$ 10,001 to $ 25,000
Level 5	$ 25,001 to $ 50,000
Level 6	$ 50,001 to $ 100,000

(to be filled by updating staff)
☐ BMIS updated
☐ District Database updated
Post：________________
Signature：________Date：________

Annex 3

沙田民政事務處大廈探訪報告

1. 樓宇名稱：________________業主立案法團 / 互助委員會 / 業主委員會 / 未有居民組織

1.1 大廈/屋邨座數：____________

2. 地址：________________________________分區：________________

3. 探訪目的：
☐ 出席會議＊(Formation / AGM / EGM / Owners' mtg / MC / Exco)
☐ 日常聯繫　☐ 巡察大廈
☐ 逐戶家訪(收集成立法團意見)　☐ 派遞文件 / 信件
☐ 探訪天台屋居民　☐ 其他 (請註明)：________________

4. ☐ Date of visit
☐ Date of OC AGM
☐ Date of OC Election / Re-election
(可✓多項)
Date：____________時間：________________地點：________________________

5. 出席民政處人員(以英文填寫)
Name：____________Post：____________Name：____________Post：____________
Name：____________Post：____________Name：____________Post：____________

6. 會見 / 訪談人士：
主席：________________電話：________________地址：________________
秘書：________________電話：________________地址：________________
司庫：________________電話：________________地址：________________
其他委員：____
其他人士：____

7. 管理公司：＊Y / N　管理公司名稱(如有)：________________________
負責人：________________職位：________________電話：________________

8. 保安員 / 管理：＊Y / N　姓名(如有)：____________管理處電話：____________

(續後頁)

9. 會議 / 訪談 / 巡察撮要

1. ____________________
2. ____________________
3. ____________________
4. ____________________
5. ____________________

10. 大廈管理情況

事項	情況				備用
	滿意	尚可	不滿意	不適用	
清潔狀況					
保安狀況					
I) 大閘					
II) 閉路電視					
III)管理員					
消防設備					
I) 滅火筒					
II) 大廈防煙門					
III)消防喉轆					
公共地方照明情況					
告事欄					
其他事項(請註明)					

報告人員姓名：____________ 職位：____________ 簽署：____________

(註：請於探訪大廈後一星期內遞交報告) 遞交報告日期：____________

11. 主任備註：

____

____

主任姓名：____________ 職位：____________ 簽署：____________

日期：____________

Guidelines for handling request for prosecution under the BMO

(I) Background

Under the Building Management Ordinance, there are some penalty clauses, namely S10(3), S11(3), S12(4), S27(3), S32(3), S35, S36, S40A(2) and S40(B)2. Arising from a previous case, D of J's advice was sought on who should be the prosecutor for breaches of such section. D of J's reply indicated that where there is an offence to contravene a provision in the BMO including those mentioned above, it is the Government who would be responsible for prosecution of offences.

In considering that there may be other members of the public who would request SHA to initiate prosecution for cases of contravening these provisions, the following procedures have been drawn up by HAB and HAD to facilitate DOs to handle such requests.

(II) Procedure to handle requests for prosecution of cases

When DO receives a request from members of the general public suggesting SHA to prosecute person in breach of the stipulated provisions, the subject officer(s) should find out facts and information to see whether there is adequate evidence to substantiate the alleged breach. The DO should then provide the SHA via DHA with a report giving the case background, related facts and information as well as the recommendation to prosecute or otherwise. The recommendation should make reference to the following factors :-

(a) nature of the offence – whether it is trivial or significant; whether any persons have suffered or have been victimized as a result of the offence;

(b) intention of the offenders – whether the offence is committed intentionally or due to an oversight; and

(c) public interest – whether it is in the public interests to prosecute; whether the prosecution would have a negative effect of deterring people from taking part in building management.

Source: Annex XII,
Operational Manual on Building Management for Liaison Officers

The DO should acknowledge receipt on behalf of SHA for any request (except for anonymous one) and refer the case to HAB via HAD for consideration.

Having examined the DO's report, the subject officer of HAB will minute the SHA for his personal decision. HAB will inform the requesting party in writing on the case progress/outcome.

Guidelines for handling applications for invocation of SHA's powers under Section 40A of the Building Management Ordinance (BMO)

Background

Section 40A of the BMO provides that the Authority or an authorized officer, may, for the purpose of ascertaining the manner in which a building is being controlled, managed or administered –

(f) enter and inspect any common parts of a building;

(g) attend any general meeting of a corporation;

(h) require a corporation or any person managing the building to furnish him with such information in the possession of the corporation or that person, as the case may be, as the Authority or authorized officer may specify in relation to the control, management and administration of the building;

(i) inspect the books or records of account and other records maintained under section 27(1) including any accounts relating to any fund established and maintained under section 20; and

(j) inspect any other documents or records kept by a corporation in relation to any of its functions, duties or powers.

2. In the previous years, there had been a few applications from members of the general public requesting SHA to invoke his powers under this section. Each of these applications had been submitted to SHA for consideration on individual merits. However, none was found to be justifiable for SHA's invocation of powers under Section 40A.

3. Department of Justice had advised that the powers could only be exercised for the purpose of ascertaining how a building is being controlled, managed or administered. Exercising of the powers for other purposes could be judicially reviewed.

Source: Annex XIII,
Operational Manual on Building Management for Liaison Officers

4. HAD's policy line is that the owners and residents should be encouraged to manage their buildings under a self-help concept. Our intervention on the management of individual buildings would be introduced only when there is a very strong need, e.g. when the owners cannot find better alternative within the legal framework. In other words, we are not assuming a role of 'supervisor-in-general' on daily management of private buildings.

5. Having said so, we should still examine all requests for invocation of Section 40A based on their individual merits. When DOs receive such requests, the subject officer should find out the case background, related facts and information. It is particularly important to see whether there are other possible solutions to the management problems other than through invocation of Section 40A.

6. The DOs should acknowledge receipt of the applications and refer them to HAB through DHA (Att : SLO(BM)). The referral should be accompanied with a report giving the case description and recommendation on whether invocation of Section 40A by SHA is appropriate.

7. Upon receipt of DO's report, the subject officer of HAB would minute to SHA recommending whether the application is supported. When SHA has made his personal decision, the applicant will be informed in writing about the outcome.

Departmental Instructions on the Handling of Building Management Complaints and Enquiries

Complaints and Enquiries

(I) Nature of complaints

11.1 BM Complaints are very diverse and sometimes trivial in nature. Matters concerning management, conditions and environment of a building may be a subject of complaint. However, the majority of BM complaints relate to dispute between different parties over MC operation and financial matters.

11.2 Broadly speaking, most of the BM complaints are concerning about :-

- general enquiries for information/clarification
- specific complaints against malpractice/wrong-doers
- disputes arising from conflicts of interests among owners
- complaints against HAD staff

(II) Stance of HAD staff

11.3 In handling BM disputes, HAD staff should assist and facilitate the parties concerned in resolving their problems. HAD staff will not arbitrate or take a policing role over any disputes. In addition, staff should adopt an impartial stance and guard against entangling in disputes. In case the matter is involved in any legal proceedings, the owners or OC should be advised to seek advice from their own lawyers. HAD staff should make it clear that their advice only represents a third party's advice/opinion and is by no means a legal advice. As a rule of thumb, staff should play an advisory and mediating role in line with HAD's defined policy.

(III) Procedures in handling BM cases

At Headquarters

11.4 BM cases handled by HQs mainly involve :-

Source: Chapter 11,
Operational Manual on Building Management for Liaison Officers

- BM Policy
- interpretation of BMO provisions
- dissemination of advice by government counsel on interpretation of BMO and BM cases
- applications for invocation of SHA's powers under BMO
- complaint from Legislative Councillors, District Council members and the general public

11.5 Upon receipt of complaints/enquiries of general nature, HQs would reply to the complainant/enquirer direct. For those cases of complicated nature, district staff would be required to provide background brief on the case and a draft reply. Routine and trivial cases at district level would be referred to DO concerned for a direct reply.

At District Offices

11.6 Complaints are made either by telephone or in writing to DOs. They may also be referred from :-

- HAD HQs or HAB
- Legislative Councillors or DC members
- other government departments
- political parties or interested groups
- mass media
- TCOs who attended OC/MAC meetings

11.7 On receipt of complaints, the following steps are generally taken :-

- to record verbal complaints on a standard form (Annex XXXVII)
- to enter into complaint register
- to acknowledge receipt (Annex XXXVIII) of complaints within 7 working days and follow up with an interim reply after a lapse of a month if a final reply is not available
- to pass complaint letters to supervisors for prior reading/instructions (if any)
- to make file notes and conduct site visit where necessary
- to report actions taken/to be taken in file for supervisor's information/instruction (if any)

- to refer cases to relevant departments and ask for direct replies to complainants with copy to district office for information
- to follow up cases where appropriate

Annex 7

Ref. : HAD/GA/17/1 II

Home Affairs Department
12 May 2000

HAD Standing Circular No. 16/2000
Complaints by Members of the Public

General

This circular sets out the guidelines to be followed in the HAD on receipt of complaints from members of the public direct, made through the media, or referred by other departments and agencies, including the LegCo Secretariat and the ICAC. Guidelines for dealing with complaints referred by the Ombudsman are set out in HAD Standing Circular No. 9/2000. HAD Standing Circular No. 1/96 is hereby replaced.

2. The aim of the circular is to ensure that a uniform approach is adopted throughout the HAD in dealing with complaints from the public. Where necessary, existing district arrangements for handling complaints should be revised to follow the procedure and guidelines in this circular.

Definition of Complaints

3. The two main categories of complaints are :-

(a) dissatisfaction with policy or the way in which policy is implemented; and

(b) objections to the standard of service provided or the course of action taken, including delays and staff conduct such as rudeness, lack of concern and failure to perform duties properly.

Complaints Officer

4. To ensure that complaints are recorded and dealt with properly, the District Secretary or an officer at EO I rank or above should be appointed as Complaints Officer in each District Office to be responsible for administering the complaints procedure. In HAD HQ, SEO(PES) is the Complaints Officer.

5. All oral and written complaints, including anonymous ones, received in the office must be referred immediately to the Complaints Officer for entry in a Complaints Register as at the annex to this circular. The Complaints

Officer should then pass the complaint to the District Officer/Division Head who will appoint an officer to investigate the case and take follow-up action, including drafting a reply to the complainant. When action on a complaint is completed, the action file should be passed to the Complaints Officer for information and notation in the Complaints Register. If a complaint is referred by HQ to a District Office for action, a copy of the final reply to the complainant should be sent to SEO(PES.) for record purposes.

Security Grading of Complaints

6. Complaints against staff should be graded 'Restricted(Staff)'. Other complaints should be given a security grading appropriate to their seriousness and sensitivity.

Direct Complaints from the Public

7. The subject officer appointed by the District Officer/Division Head to deal with a written or oral complaint should acknowledge it in writing within ten days and inform the complainant of the length of time that the investigation is likely to take. All possible steps should be taken to confirm the address on an incoming letter if it is incomplete, before sending out the acknowledgement. If the acknowledgement letter is undelivered, the returned envelope should be retained for future reference. If the final reply is delayed, the officer should send an interim reply to the complainant, explaining the reasons for the delay. The final reply should contain all details necessary to satisfy the complainant that the complaint has been investigated and dealt with properly. The subject officer should clear the final reply with his District Officer/Division Head beforehand. If the complaint is against a staff member or if the complaint is of a sensitive/serious nature, it should be referred to the appropriate Deputy Director for information.

8. An anonymous complaint should not be disregarded without reference to the District Officer/Division Head. A misdirected complaint should be referred to the appropriate bureau/department with a request for investigation and direct reply to the complainant on the outcome, and the complainant should be informed that this has been done; the complainant should **not** be advised to resubmit his complaint to another bureau or department.

Complaints made through the Press

9. When a complaint is published through the press, it should be handled as a written complaint in accordance with paras. 5 and 7 above, except that the subject officer should consult the Principal Information Officer in HAD HQ on the line of the reply to be sent and clear the reply with the appropriate Deputy Director. A reply should be sent to the newspaper concerned within seven days of the publication of the complaint, and copied to the PIO. It should be factual, helpful and as brief as the occasion justifies.

10. It may sometimes be undesirable to reply to a complaint or criticism made in the press because :-

(a) the subject matter is politically sensitive or sub judice;

(b) no satisfactory reply can be given without causing embarrassment; or

(c) the subject matter is too general, trivial or unimportant.

In such an event, the subject officer must clear the recommendation not to send a reply with his District Officer/Division Head, who should in turn consult the appropriate Deputy Director.

Complaints referred by the LegCo Secretariat

11. All complaint referrals by the LegCo Secretariat should be answered as promptly as possible. Reference should be made to Secretariat Confidential Circular No. 2/96 when deciding whether and how the information requested should be supplied. All replies to the LegCo Secretariat should be copied to SEO(PES), who maintains a central register, for submission to the appropriate Deputy Director for information.

Complaints referred by the ICAC

12. Complaints received by the ICAC and which have not been investigated for lack of substance or where there are no allegations of corruption, may be referred to the HAD, particularly where there are operational or management considerations.

13. The procedure for handling these complaints is :-

(a) the Departmental Secretary will send any complaints received in HQ to the appropriate District Officer for consideration and action, and pass the file to the appropriate Deputy Director for information pending a reply from the District Officer;

(b) the District Officer should let the appropriate Deputy Director have a brief initial report, preferably within two weeks, and let him know what follow-up action it is proposed to take, if any, with an indication of when that action can be expected to be concluded;

(c) if, after a period of one month, no initial comments are forthcoming, the Departmental Secretary will draw the matter to the attention of the appropriate Deputy Director;

(d) in cases where the complainant appears to be expecting a reaction from the administration, the District Officer will need to decide whether and at what stage he/she should interview or reply to the complainant; and

(e) if the District Officer considers an in-depth investigation or some other form of follow-up action is necessary, he/she should appoint an officer to pursue it. A report, endorsed by the District Officer, should be forwarded to the appropriate Deputy Director upon completion of the investigation.

(ICAC referrals received directly by District Officers should be copied to the appropriate Deputy Director for information, and action taken as in (b)-(e) above.)

Complaints referred by Chief Executive's Office

14. All complaint referrals by Chief Executive's Office should be answered as promptly as possible . Reference should be made to Secretariat Confidential Circular No. 2/97 for procedures to be followed for petitions and letters addressed to the Chief Executive. All replies to Chief Executive's Office should be copied to SEO(PES) for submission to the appropriate Deputy Director for information.

Priority

15. Complaints referred by agencies such as the LegCo Secretariat and the ICAC, should not automatically be given priority over complaints received direct from the public. Priority should be accorded in accordance with the seriousness of the complaint, the date of receipt, and the adverse consequences of delay.

Repeated Complaints

16. A repeated complaint should be considered by an officer senior to the subject officer who dealt with the earlier complaint. He should satisfy himself that it was properly dealt with and that the complaints system is in order.

Appeals

17. An appeal lodged by a complainant about the decision taken by the District Officer/Division Head on his complaint should be referred to the appropriate Deputy Director for consideration. The case file and all relevant materials should be forwarded under a covering note at the same time.

Management Information

18. Once a complaint has been investigated, the case should be reviewed to identify the need for any changes, for example, in departmental policy and procedures. Complaints Officers should maintain and analyse statistics on complaints for trends which may suggest the need for changes in their offices.

Supervision

19. District Officers/Division Heads should supervise the operation of the complaints system as follows :-

(a) make arrangements to see all incoming complaints to ensure that appropriate directions are given and priorities properly accorded;

(b) carry out regular reviews of progress on outstanding complaints; and

(c) approve the line to take in replying to a complainant or direct no further action on a complaint.

20. District Officers should also review periodically their complaints systems to ensure that they comply with this circular. In HAD Headquarters, this will be done by the Departmental Secretary.

21. Enquiries on this circular should be addressed to SEO(PES) or the Departmental Secretary. The circular and district instructions should be re-circulated every six months and staff who deal regularly with complaints from the public should be given personal copies.

for Director of Home Affairs

Related HAD Standing Circulars

- No. 14/95 Complaints of Sexual Harassment
- No. 17/95 Investigations undertaken by Independent Commission Against Corruption
- No. 2/96 Staff Complaints Procedure
- No. 9/2000 Investigation Undertaken by The Ombudsman

With Chinese Translation

To : Normal distribution

c.c. SHA
HAD/GA/6/14
HAD/CB/CON/17/57III

Annex 8

Recommendations for the Direct Investigation on the Role of Home Affairs Department in Facilitating the Formation of Owners' Corporations

Means of Service Delivery

(a) to produce a comprehensive information-cum-resource kit including VCD on OC formation for reference of owners and those who wish to form OCs;

(b) to improve the website on building management by adding a thematic section and a sitemap for ready retrieval of information;

(c) to seek client feedback and review the opening hours of BMRCs to suit client convenience;

(d) to enhance the telephone enquiry and advisory service for client convenience;

(e) to enrich the contents of reference manuals, and to publish categorised case studies of good practice and summaries of court judgments on building management cases for staff reference;

(f) to produce information materials, such as leaflet and poster, on the criteria, limitations and procedures of the free professional advisory service;

(g) to identify and review operations essential to the delivery of services on OC formation, draw up appropriate criteria, guidelines and procedures for these operations and suitably promulgate them among staff;

(h) to consider the scope for simpler, less formal and less costly mechanism for resolving building management disputes;

(i) to expedite the production of a clear and comprehensive pamphlet to publicise building management services;

(j) to publish a central building management bulletin or newsletter to disseminate to the public up-to-date building management information and services;

(k) to organise and conduct more talks with OC formation as the main theme;

Support and Control

(l) to provide support for frontline staff by professional advisory service in a more systematic manner;

(m) to strengthen staff training on customer services, communication and mediation skills as well as training on the BMO and other building management issues;

(n) to include more performance indicators to better reflect efforts on OC formation and to set out corresponding targets to better monitor staff performance;

(o) to regularly publish performance targets and achievement on OC formation services for improved transparency and accountability;

(p) to set up client liaison group(s) to tap client feedback and suggestions for service improvement;

(q) to tap the local knowledge of DCs for views on strategies, priorities, targets and feedback on the work and performance of District Building Management Liaison Teams;

Organisational Set-up and Staff Deployment

(r) to rectify the situation in some DOs where District Building Management Liaison Teams exist nominally but not in practice;

(s) to review and revise the duties of TCOs;

Others

(t) to consider amending the law to empower the department to investigate into complaints alleging non-compliance with the legal requirements for OC formation; and

(u) to review critically, in consultation with stakeholders, the department's role and services in building management.

Annex 9

Recommendations for the Direct Investigation on Assistance Provided by Home Affairs Department to Owners and Owners' Corporations in Managing and Maintaining their Buildings

HAD

Staff Deployment

(a) To critically review its staff complement, in particular the across-the-board deletion of all housing and professional grades posts for building management services;

(b) To clarify and publicise the roles of liaison officers and TCOs for a realistic perception and reasonable expectations by owners and OCs;

Means of Service Delivery

(c) To upload building management publications onto or provide hyperlink access through the building management website;

(d) To enhance the information on the website and allow alternative access by themes;

(e) To produce, in collaboration with departments and professional bodies, more checklists for the reference of owners and OCs;

(f) To review the needs of BMRC users on a regular basis and extend or revise the opening hours of BMRCs for client convenience;

(g) To publicise more widely the pilot mediation scheme provided at BMRCs;

(h) To step up training on the legal aspects of BMO for OC members;

(i) To critically review and resolve the interface problems between BMCC and CMBS;

Support and Control

(j) To expedite the production of staff reference materials under preparation and to expand the FAQs;

(k) To refine the staff training and development plan;

(l) To consider sponsoring appropriate staff to acquire formal qualification in housing management in order to build up departmental expertise;

(m) To devise a set of standard classification of building management themes and sub-themes for consistent reporting of management information;

(n) To consider setting up in DOs a network of Client Liaison Groups to tap user feedback and suggestions; and

The Administration

(o) To consider designating one single bureau in Government to coordinate the formulation of policies on private building management.